IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 727 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UNITED INDIA INSURANCE CO. LTD

Versus

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Appearance:

MR PV NANAVATI for the appellant.
MR VIBHUTI NANAVATI for the appellant.
MR SANDIP C SHAH for Respondent No. 1/1
SERVED BY RPAD - (N) for Respondent No. 1/1-1/6
NOTICE SERVED for Respondent No. 2
NOTICE UNSERVED for Respondent No. 3-1/6

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE KUNDAN SINGH

Date of Order: 26/11/2002

ORAL ORDER

(Per : MR.JUSTICE B.J.SHETHNA)

In this appeal, the appellant United India Insurance Co. Ltd., original opponent no. 3 has challenged the impugned judgment and award dated 24th April, 2001 passed by the learned Motor AccidentClaims Tribunal (Auxiliary), Ahmedabad in Motor Accident Claims Petition No. 338 of 1995 filed by the respondents-claimants, legal heirs of deceased Jayantilal Khatri who died in a vehicular accident which took place on 4.3.1995. By the impugned award, the learned Tribunal has partly allowed the claim petition of the claimants and held that the opponentnos.1, 2 and 3, i.e. driver, owner and insurance company were jointly and severally held liable to pay the amount of Rs. 2,23,000/- against claim of Rs.2,50,000/- towards compensation with interest at the rate of 9% per annum from the date of claim petition till its realisation with costs.

2. On the fateful day of 4th March, 1995, the deceased Jayantilal Khatri who was going on his bicycle in the early morning hours at 6.00 a.m., from Kalupur station to Prem Darwaja to distribute and sell newspapers to his regular customers, at that time the opponent no. 1 driver of truck no. GQA 7284 which was owned by opponent no. 2 which was insured with the opponent no. 3 insurance company knocked down the deceased Jayantilal Khatri. He sustained injuries in the accident and immediately removed to V.S. hospital where he succumbed to his injuries. For the untimely death of Jayantilal Khatri, his legal heirs-claimants filed claim petition no. 338 of 1995 before the learned Motor Accident Coaims Tribunal claiming compensation of Rs. 2,50,000/-. All the three opponents i.e. driver, owner and insurance company were duly served. However, though duly served, opponent nos. 1 and 2 did not prefer to appear before the Tribunal either in person or through their counsel and not preferred to challenge the claim of the claimants by way of filing a written statement. The original opponent no.3 i.e. present appellant filed written statement at exh. 40.

3. It may be stated here that later on the insurance company filed an application under section 170 of the Motor Vehicles Act and prayed that they may be

permitted to contest the claim of the claimants on all or any of the grounds available to the opponent nos. 1 and 2.

3. It may be noted at this stage that after the interim award was passed by the learned Tribunal under section 140 of the Motor Vehicles Act (for short "the act"), an application exh. 34 was moved by the insurance company contending that the cheque submitted by the opponent no. 3 owner of the truck towards premium was dishonoured. Thus, there was no valid contract betwee the insurance company and the insured i.e owner of the truck, therefore, there was no valid insurance policy. Hence Insurance Company is not liable.

4. In support of its case, the insurance company examined two witnesses and produced various documents before the learned Tribunal to substantiate its stand that the insurance policy was never prepared and the same was cancelled immediately as soon as the cheque submitted by the insured-owner of the truck towards premium amount was dishonoured.

5. It was contended before the learned Tribunal as well as before us that in the instant case, the policy was from 25th July, 1994 to24th July, 1995 and the accident took place on 4th March, 1995. However, the cheque issued by the owner of the truck to the insurance company bounced back on 29th July, 1994. Therefore, the insurance company cannot be held liable to indemnify the claim of the claimants. However, the learned Tribunal did not find favour with this submission raised by the insurance company before it and accordingly, the learned Tribunal has partly allowed the claim petition of the claimants and held that all the opponents including opponent no. 3 insurance company were jointly and severally liable to pay the amount of Rs. 2,23,000/- as against the claim of Rs.2,50,000/- of the claimants towards compensation with interest at the rate of 9% per annum from the date of the application till its realisation with costs. Hence this appeal at the instance of the insurance company.

6. The learned counsel Mr. Nanavati appearing for the appellant insurance company vehemently submitted that there was no valid policy in existence on the day on which the accident took place. Therefore, the insurance company could not have been held liable to saisfy the claim of the claimants. He submitted that as per the cheque which was dishonoured on 29th July, 1994,

the period of policy was from 25th July, 1994 to 24th July, 1995 and the accident took place on 4th March, 1995, therefore, there was no valid contract between insured and insurer- insurance company. In that view of the matter, the learned Tribunal ought not to have passed the award against the insurance company-original opponent no.3. In support of his submission, Mr.Nanavati has relied on the judgment of the Hon'ble Supreme Court in the case of National Insurance Company Ltd. vs. Seema Malhotra and others reported in 2001(3) SCC, 151.

7. Before dealing with the aforesaid judgment of the Hon'ble Supreme Court cited by Mr. Nanavati, we would like to narrate few relevant facts of the present case which are as under:

(i) The proposal of insurance of truck no. GQA 7284 was already sent to the insurance company through an insurance agent by Shivshakti Transport company, owner of the vehicle-opponent no. 2 and the cheque of Rs. 1512/- was issued in favour of the appellant insurance company drawn on Bombay Mercantile Co-operative Bank. The said cheque was dishonoured on 29th July, 1994 and intimated to the company by the Union Bank of India.

(ii) The period of policy was from 25th July 1994 to 24th July, 1995.

(iii) The insurance policy was prepared and issued thereby liability of the insurance company came into existence.

(iv) As per the case of the appellant insurance company, as soon as the cheque was dishonoured, they cancelled the policy and intimated the same to the insured-owner of the truck, but there is nothing on record to show that it was received by the owner of the truck.

(v) As per the case of the insurance company, premium was not paid thereafter.

(vi) The policy was prepared in five copies, one copy in the name of the insured and other copies were lying in the office of the insurance company and one was sent to the agent.

(vii) Cancellation of the policy exh. 61 was also prepared in five sets and the original was sent to the concerned party. Exh. 62 is the cancellation advice which preceeds cancellation endorsement exh. 61, but there is nothing on record to show that it was received by the owner of the truck.

(viii) Exh. 6 is the copy of the despatch register showing name of insured Shivshakti Transport at serial no. 7.

(ix) In the premium register, the intended policy number is reflected and the policy reflects the risk coverage period which is shown at serial no.64. It was admtitedly not allotted to any other person holding the policy.

(x) Said policy number 31213 was pertaining to the offending vehicle no. GQA 7285. Original premium receipt was given to the insured and the cerificate of insurance were prepared together by the same document exh.56. Exh.56 is the insurance certificate whereas, exh.57 is the insurance policy. Both these documents were prepared simultaneously.

8. In view of the above facts, we are of the clear opinion that once the premium receipt, certificate of insurance and insurance policy are prepared and thereafter, if any change is to be effected in the terms of the policy, then it is to be done by way of endorsement and till such change is made, the policy issued earlier remains in existence. Any step taken by the insurance company to make any change in the policy requires to be intimated to the insured.

9. The insurance company has tried to come out with a case that the endorsement was made about cancelling the policy and the same was intimated to the insured by an ordinary post. It is an admitted fact that duty was cast upon the insurance company under section 64(v)(b) of the Act to verify before preparing the policy by the concerned officer. Inspite of the verification made under section 64(v)(b) of the Act, in the instant case, the policy was prepared by the insurance company. However, they denied the fact that the policy was issued after preparation of it.

10. The learned Tribunal considered the oral evidence of two witnesses examined by the insurance company before it alongwith documentary evidence and on appreciation of oral as well as documentary evidence led before it, came to the conclusion that the only document

is the register maintained by the insurance company, where despatch clerk sends information to the insured and on the basis of the entry made in the register at exh. 63. An attempt was made by the insurance company to show that the letter 8.8.94 was sent on 8.8.94 by despatch clerk. Ms. Mallika Guha at exh. 53 admitted in her evidence that the letter dated 8.8.94 was not numbered and it was sent by an ordinary post and not by registered post. Therefore, there is no proof to show that the said

letter was in fact received by the insured. She has admitted in her cross-examination that there was lot of overwriting on that page of the register at exh 63. However, an explanaion was tried to be offered by the insurance company that it was due to inefficiency or incompetence of the despatch clerk maintaining such register, the letter was sent by ordinary post. This cannot be accepted. In our considered opinion, the learned Tribunal has also rightly rejected such a lame excuse offered by the insurance company.

11. The appellant insurance company has also examined one more witness,namely Shantilal Khatri at exh. 68, the insurance agent who had filled in the proposal form of Shivshakti Transport-insured and the owner of the truck in question. He had also received the amount of premium from them. He has also clearly stated in his evidence that the insurance company had a copy of the letter which was sent to the insured by him by an ordinary post. However, in the cross-examination, he has admitted that in the official communication between insurance company and insured will not come to his knowledge. He had no documentary evidence to show that the insurance company had sent the letter intimating about dishonouring of the cheque. He was not in a position to state as to whether such a letter of cancellation was sent to Shivshakti Transport or not. He has also admitted that he received Rs. 72/- towards commission on the proposal submitted to the insurance company on behalf of the insured Shivshakti Transport and the premkum receipt no. was 5981.

12. Thus, from the above evidence and the discussion made by the Tribunal in its impugned award, it is clear that the insurance company has miserably failed to prove that they had ever informed the insured of the dishonoured cheque. In that view of the matter, we are not inclined to take a different view than the view taken by the learned Tribunal in its impugned judgment and award. In view of the peculiar facts and circumstances stated hereinabove, we are of the clear opinion that the judgment of the Hon'ble Supreme Court in the case of National Insurance Co. (Supra) has no application whatsoever and it will not help the appellant insurance company in this case. In Seema's case,(Supra) legal heirs of the deceased insured approached some other forum for their claim. On facts of that case, the State Consumer Protection Commission held that the concept of contract in essence envisages a proposal, acceptance and passing of consideration. In the absence of any

consideration there can be no contract and that is all what is recognised by Section 64-VB of the Insurance Act. The insurer was justified in repudiating the contract and it has done it in time and soon after the cheque bounced. Accordingly, the claim was dismissed. However, division bench of Jammu and Kashmir High Court held that while ordering the cancellation of policy in question, the respondent company instead of cancelling the same due to dishonour of cheque of the premium from the date which was issued i.e. 21.12.1993, chose to cancel it "with immediate effect". That shows that till the issuance of this communication the respondent Insurance Company itself treated the policy subsisting. The said judgment of the Division Bench of the J and K High Court was reversed by the Hon'ble Supreme Court in an SLP filed by the insurance company wherein the Hon'ble Supreme Court held that the insurer is under no obligation to perform its part of contract except in relation to its liability. Thus, it is clear that the aforesaid judgment of the Hon'ble Supreme Court will never be applicable to a third party i.e. the claimants. Under the circumstances we fail to appreciate how the aforesaid judgment of the Hon'ble Supreme Court will have any application to the facts of the present case.

15. At the cost of repetition, we may state that once a valid policy is taken, for which the agent was given a premium then if it was to be cancelled subsequently due to dishonouring of the cheque, then it is the duty of the insurance company to prove that the intimation regarding cancellation was received by the insured. In absence of any evidence led by the insurance company in this behalf, we are not in a position to take a different view of the matter, than the view taken by the learned Tribunal. At this stage, learned counsel Mr. Nanavati submtited that the claimants ought to have examined opponent no. 2 to prove that he had never received such intimation from the insurance company. We are not inclined to accept this submission of learned advocate Mr. Nanavati. If the insurance company has come out with a case that the policy was cancelled by it and the intimation regarding the same was already communicated to the insured, then it was for the insurance company to prove its case, which they miserably failed to prove.

16. Lastly, it was submitted by Mr. Nanavati that this court may observe that the insurance company may recover the awarded amount from the insured. We are of the opinion that no such observations are required to be made by us. If the insurance company is entitled to

recover the amount awarded to the claimants from the insured under the law, then it can always avail suitable remedy for it, for which no observation from this court is required.

17. Before parting with, we may state that a formal order of calling R and P of the Tribunal was not passed by us, but the entire record was made available to us by the learned advocate Mr. Shah for the respondents-claimants which includes the certificate exh. 64 issued by the insurance company bearing policy no.31213 for the period from 25th July, 1994 to24th July,1994. The accident took place on 4.3.1995. In that view of the matter, there was no other option for this Court, but to hold that the insurance company was liable to satisfy the claim of the third party i.e. claimants.

18. In view of the above discussion, this appeal fails and is hereby summarily dismissed with costs. Notice is discharged.

(B.J.Shethna,J)

(Kundan Singh,J)

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